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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

|                                    |   |  |
|------------------------------------|---|--|
| NACIMIENTO WATER COMPANY,<br>INC., | ) | Case No. CV 13-07959 DDP (MRWx)          |
|                                    | ) |  |
| Plaintiff,                         | ) |  |
|                                    | ) | <b>ORDER RE: COUNTERDEFENDANTS' JOHN</b> |
| v.                                 | ) | <b>KING, CAROLE KING, AND SMS</b>        |
|                                    | ) | <b>RESORTS, INC'S MOTION FOR SUMMARY</b> |
|                                    | ) | <b>JUDGMENT</b>                          |
| INTERNATIONAL FIDELITY             | ) |  |
| INSURANCE CO. A New Jersey         | ) |  |
| Corporation, et al.,               | ) | [Dkt. 81]                                |
|                                    | ) |  |
| Defendants.                        | ) |  |
|                                    | ) |  |

Presently before the court is Cross-Defendants John King, Carole King (collectively, "the Kings"), and SMS Resorts, Inc. ("SMS")'s Motion for Summary Judgment. Having considered the submissions of the parties and heard oral argument, the court grants the motion in part, denies in part, and adopts the following order.

**I. Background**

In 2003, Jonatkim Enterprises, the developer of a residential subdivision in San Luis Obispo County, entered into a contract with

1 Plaintiff Nacimiento Water Company ("the Water Company"). Under  
2 the contract (the "Water Contract"), the Water Company agreed to  
3 provide water service to the residential lots in exchange for  
4 payment of \$5,000 per lot, to be paid within four years of the  
5 recordation of the subdivision's final tract map. The contract  
6 also required the issuance of a \$500,000 performance bond, which  
7 was issued by Cross-Complainant International Fidelity Insurance  
8 Company ("IFIC") on the developer's behalf.

9 Developer Jonatkim made a partial payment to the Water  
10 Company, but then transferred its interest in the subdivision to  
11 the Kings. The Kings also assumed Jonatkim's obligations under the  
12 Water Contract and obtained a surety bond ("the Water Bond") from  
13 IFIC similar to that originally issued to Jonatkim in favor of the  
14 Water Company. IFIC also issued six other bonds ("the County  
15 bonds") related to the subdivision in favor of the County of San  
16 Luis Obispo.

17 Before the Kings purchased the subdivision from Jonatkim, they  
18 established Counterdefendant SMS to manage a separate and unrelated  
19 hotel property. (Undisputed Fact 10.) In 2004, IFIC issued five  
20 bonds ("the Hotel bonds") in favor of Southern California Gas  
21 Company in relation to the SMS hotel property. (UF 12.) Before  
22 issuing the Hotel bonds, IFIC required both the Kings and SMS to  
23 sign a General Indemnity Agreement ("the 2004 Agreement"). The  
24 2004 agreement stated that "some or all of the [three] Indemnitors  
25 are required, or may desire" to give bonds, and that the three  
26 indemnitors had an interest "in the obtaining of Bonds by any of  
27 the Indemnitor(s)." (King Decl., Ex. F.) Under the 2004  
28 agreement, the Kings and SMS agreed to indemnify IFIC for any

1 losses connected to the "the furnishing of any bond . . . for or on  
2 behalf of . . . one, some or all of the Indemnitors." (Id.) The  
3 2004 Agreement also stated that it was in addition to, rather than  
4 in lieu of, any other agreements or obligations undertaken in favor  
5 of IFIC. (Id.) The 2004 Agreement also allowed each Indemnitor to  
6 terminate participation upon written notice of at least 20 days.  
7 (Id.) Neither the Kings nor SMS ever terminated the 2004  
8 Agreement.

9 In 2005, subsequent to the Kings' purchase of the subdivision  
10 and prior to IFIC's issuance of the County bonds, the Kings  
11 executed another General Indemnity Agreement ("the 2005  
12 Agreement"). SMS was not a party to the 2005 Agreement. The 2005  
13 Agreement was not identical to the 2004 Agreement, and contained  
14 additional provisions, including a homestead exemption waiver,  
15 takeover provisions, and trust provisions. (King Decl., Ex. E.)  
16 Like the 2004 Agreement, however, the 2005 Agreement contained a  
17 provision stating that any other rights IFIC had against the Kings,  
18 including other indemnity agreements, were "in addition to, and not  
19 in lieu of," the rights afforded to IFIC under the 2005 Agreement.  
20 (Id.)

21 No claims were ever made on the Hotel bonds, which terminated  
22 in 2006. The Kings did not, however, complete the development of  
23 the subdivision, which they lost to foreclosure. In 2010, the  
24 Water Company notified IFIC that the Kings had defaulted on the  
25 Water Bond. The Water Company later filed the instant suit against  
26 IFIC to recover on the Water Bond.

27 IFIC's Second Amended Counterclaim alleges that the Kings  
28 defaulted not only on the Water Bond, but on two of the six County

1 Bonds as well. (Second Amended Counterclaim ¶ 19.) IFIC asserts  
2 four causes of action seeking indemnification for losses related to  
3 the three defaulted bonds from both the Kings and SMS. The instant  
4 motion seeks summary judgment against IFIC on all claims against  
5 SMS and Water bond-based claims against the Kings.

## 6 **II. Legal Standard**

7 Summary judgment is appropriate where the pleadings,  
8 depositions, answers to interrogatories, and admissions on file,  
9 together with the affidavits, if any, show "that there is no  
10 genuine dispute as to any material fact and the movant is entitled  
11 to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party  
12 seeking summary judgment bears the initial burden of informing the  
13 court of the basis for its motion and of identifying those portions  
14 of the pleadings and discovery responses that demonstrate the  
15 absence of a genuine issue of material fact. See Celotex Corp. v.  
16 Catrett, 477 U.S. 317, 323 (1986). All reasonable inferences from  
17 the evidence must be drawn in favor of the nonmoving party. See  
18 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986). If the  
19 moving party does not bear the burden of proof at trial, it is  
20 entitled to summary judgment if it can demonstrate that "there is  
21 an absence of evidence to support the nonmoving party's case."  
22 Celotex, 477 U.S. at 323.

23 Once the moving party meets its burden, the burden shifts to  
24 the nonmoving party opposing the motion, who must "set forth  
25 specific facts showing that there is a genuine issue for trial."  
26 Anderson, 477 U.S. at 256. Summary judgment is warranted if a party  
27 "fails to make a showing sufficient to establish the existence of  
28 an element essential to that party's case, and on which that party

1 will bear the burden of proof at trial." Celotex, 477 U.S. at 322.  
2 A genuine issue exists if "the evidence is such that a reasonable  
3 jury could return a verdict for the nonmoving party," and material  
4 facts are those "that might affect the outcome of the suit under  
5 the governing law." Anderson, 477 U.S. at 248. There is no genuine  
6 issue of fact "[w]here the record taken as a whole could not lead a  
7 rational trier of fact to find for the nonmoving party." Matsushita  
8 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).  
9 It is not the court's task "to scour the record in search of a  
10 genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275, 1278  
11 (9th Cir.1996). Counsel has an obligation to lay out their support  
12 clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d 1026, 1031  
13 (9th Cir.2001). The court "need not examine the entire file for  
14 evidence establishing a genuine issue of fact, where the evidence  
15 is not set forth in the opposition papers with adequate references  
16 so that it could conveniently be found." Id.

### 17 **III. Discussion**

#### 18 **A. SMS**

19 SMS argues that under the 2004 Agreement, SMS only agreed to  
20 indemnify IFIC for losses related to the Hotel bonds, and that the  
21 2004 Agreement has no bearing on the Water bond or County bonds.  
22 (Motion at 9.) Citing but a single case authority, SMS appears to  
23 contend that the conduct of the parties indicates that the 2004  
24 Agreement never applied to bonds other than the Hotel bonds and  
25 that, in any event, the terms of the 2005 Agreement superceded the  
26 2004 Agreement.

27 Indemnity agreements are interpreted under the same rules that  
28 govern contract interpretation generally. City of Bell v. Superior

1 Court, 220 Cal.App.4th 236, 247 (2013). "[T]he interpretation of a  
2 contract must give effect to the mutual intention of the parties .  
3 . . at the time the contract is formed . . . ." E.M.M.I. Inc. v.  
4 Zurich American Ins. Co., 32 Cal.4th 465, 470 (2004) (internal  
5 quotation and citation omitted). "Such intent is to be inferred,  
6 if possible, solely from the written provisions of the contract."  
7 Id. "When a dispute regarding the meaning of a contractual  
8 provision exists, the court must first determine whether on its  
9 face the language is capable of differing or inconsistent  
10 reasonable interpretations." City of Bell, 220 Cal.App.4th at 248.  
11 "If the instrument is reasonably susceptible to the interpretation  
12 urged, the court must receive any relevant extrinsic evidence the  
13 party puts forth to prove its interpretation." Id.; See also  
14 Rodman v. Safeway, Inc., No. 11-cv-3003-JST, 2015 WL 604984 at \*4  
15 (N.D. Cal. Feb. 12, 2015).

16 Here, SMS does not identify any particular term of the 2004  
17 Agreement to which it takes exception, let alone identify a  
18 specific alternative meaning for any specific term. Presumably,  
19 however, SMS reads the 2004 Agreement's language referring to the  
20 Indemnitors' liability for losses related to "the furnishing of any  
21 bond . . . for or on behalf of . . . one, some or all of the  
22 Indemnitors" to mean something along the lines of "any bond  
23 relating to the SMS Hotel property only" or "any bond for or on  
24 behalf of SMS only." Even provisionally considering the extrinsic  
25 evidence offered - namely, that IFIC required separate indemnity  
26 agreements from the Kings for the County bonds and another,  
27 unrelated hotel property bond - SMS' proposed construction is not  
28 reasonable. Such a construction would render the terms "any" and

1 "some or all of the Indemnitors" meaningless or superfluous. See  
2 Brown v. DIRECTV, LLC, No. CV 12-8382 DMG, 2013 WL 3273811 at \*7  
3 (C.D. Cal. June 26, 2013) ("[W]here possible, a court must give  
4 effect to every word [or] phrase within a contract."). Similarly,  
5 the "in addition to" language (King Decl., Ex. F ¶ 8) providing  
6 that other agreements undertaken in favor of IFIC would be  
7 additional to, and not supplanted by, the 2004 Agreement would have  
8 no meaning if the 2004 Agreement were read to encompass the  
9 entirety of SMS' potential obligations.<sup>1</sup>

10 SMS has not advanced any reasonable interpretation of the 2004  
11 Agreement that would excuse it of its obligation to indemnify IFIC  
12 for losses related to "any bond" issued or behalf of "one, some or  
13 all of the Indemnitors." The motion is therefore denied with  
14 respect to claims against SMS.

15 B. Water Bond Claims against the Kings

16 The Kings also seek summary judgment on IFIC's Water-bond  
17 based claim against them because, the Kings contend, the Water  
18 Company's underlying claim against the Kings is time barred. (Mot.  
19 at 12.) Under the California Code of Civil Procedure, "[i]f the  
20 obligations under a surety bond are conditioned upon performance of  
21 the principal, the expiration of the statute of limitations with  
22 respect to the obligations of the principal, other than the  
23 obligations of the principal under the bond, shall also bar an

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25  
26 <sup>1</sup> For similar reasons, the 2005 Agreement does not conflict  
27 with the 2004 Agreement. While the 2005 contains additional  
28 provisions, such as the Kings' personal waiver of the homestead  
exemption, those provisions are of the type contemplated by the "in  
addition to" language present in both the 2004 and 2005 Agreements.

1 action against the principal or surety under the bond . . . ."  
2 Cal. Code Civ. Pro. § 359.5.

3 IFIC does not dispute that the Water Contract required payment  
4 within four years of recordation of the final tract map, that the  
5 map was recorded on October 7, 2003, or that the Kings breached the  
6 Water contract by failing to make payments by October 7, 2007. Any  
7 breach of contract claim the Water Company had against the Kings,  
8 therefore, appears to have expired on October 7, 2011. Cal. Code  
9 Civ. Pro. § 337.

10 Instead, IFIC contends that a grant of summary judgment would  
11 be premature because the Kings may still be required to indemnify  
12 IFIC for its losses related to the two County bond payments. That  
13 possibility, however, poses no obstacle to a grant of summary  
14 judgment regarding the Water bond-based claim against the Kings.  
15 Because the underlying Water bond claim against the Kings is time  
16 barred, the motion for summary judgment is granted with respect to  
17 IFIC's derivative claim.

18 **IV. Conclusion**

19 For the reasons stated above, the Motion for Summary Judgment  
20 is DENIED with respect to SMS. The Motion is GRANTED with respect  
21 to the Water-bond based claims against the Kings.

22

23


24 IT IS SO ORDERED.

25

26 Dated: March 19, 2015

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HON. DEAN D. PREGERSON

United States District Judge